

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b)) MB Docket No. 02-76
Table of Allotments,) RM-10405
FM Broadcast Stations.) RM-10499
(Crisfield, Maryland; Belle Haven, Cape)
Charles, Exmore, Nassawadox, and Poquoson,)
Virginia))

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 28, 2004

Released: July 30, 2004

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a Petition for Reconsideration filed by Bay Broadcasting, Inc. ("Bay Broadcasting") and a Petition for Reconsideration filed by Tidewater Communications, LLC ("Tidewater Communications"), both of which are directed to the *Report and Order* in this proceeding.¹ Commonwealth Broadcasting, LLC, and Sinclair Telecable, Inc. d/b/a Sinclair Communications (collectively, "Commonwealth Sinclair") jointly filed a Consolidated Response to Petitions for Reconsideration.² Bay Broadcasting filed Reply Comments. Tidewater Communications filed a Reply to Consolidated Response to Petitions for Reconsideration. Commonwealth Sinclair filed a Sur-Reply to Reply to Consolidated Response to Petitions for Reconsideration. Sinclair Communications and Tidewater Communications filed a Joint Request for Approval of Settlement Agreement. For the reasons discussed below, we grant Bay Broadcasting's Petition for Reconsideration to the extent indicated herein, we dismiss Commonwealth Sinclair's Petition for Reconsideration, as requested, and we approve the Joint Request to the extent indicated herein.

2. At the request of Bay Broadcasting, licensee of Station WBEY(FM) ("WBEY"), Channel 245A, Crisfield, Maryland, the *Notice of Proposed Rule Making* ("Notice") in this proceeding³ proposed the substitution of Channel 250A for Channel 245A at Crisfield, Maryland. This channel substitution

¹ *Crisfield, Maryland; Belle Haven, Cape Charles, Exmore, Nassawadox and Poquoson, Virginia*, 18 FCC Rcd 19199 (MB 2003).

² Commonwealth Broadcasting, LLC is the licensee of Station WPYA(FM) (formerly Station WEXM(FM)), Channel 291A, Poquoson, Virginia, and Sinclair Communications is the licensee of Station WROX-FM, Channel 241B, Exmore, Virginia.

³ *Crisfield, Maryland*, 17 FCC Rcd 6671 (MB 2002).

would avoid ducting interference⁴ received from Station WFPG-FM, Channel 245B, Atlantic City, New Jersey, and would permit Station WBEY to operate at maximum Class A FM facilities. In response to the *Notice*, Commonwealth Sinclair filed a Counterproposal. In the Counterproposal, Commonwealth Sinclair proposed the allotment of Channel 250B1 to Belle Haven, Virginia, as a first local aural transmission service to that community. To accommodate the foregoing allotment, Commonwealth Sinclair proposed the substitution of Channel 290A for vacant Channel 252A at Nassawadox, Virginia. In order to accommodate this channel substitution, Commonwealth Sinclair requested the reallocation of Channel 291A from Exmore, Virginia, to Poquoson, Virginia, and the modification of the license for Station WPYA(FM) (formerly WEXM(FM)) to specify Poquoson, thus providing the first local service to Poquoson. Because the reallocation of Channel 291A from Exmore to Poquoson would result in the removal of the only local FM station from Exmore, Commonwealth Sinclair also proposed the reallocation of Channel 241B, Station WROX-FM, from Cape Charles to Exmore, Virginia, and modification of the Station WROX-FM license to specify Exmore as the community of license.

3. The *Report and Order* granted Commonwealth Sinclair's Counterproposal. Thus, we allotted Channel 250B1 to Belle Haven and Channel 291A to Poquoson as first local services. As requested by Commonwealth Sinclair, we substituted Channel 290A for Channel 252A at Nassawadox, modified the Station WPYA(FM) license to specify operation on Channel 291A at Poquoson, and modified the Station WROX-FM license to specify operation on Channel 241B at Exmore. In taking those actions, we also denied the underlying Bay Broadcasting proposal for a Channel 250A substitution at Crisfield. The reasons for that denial were that the proposed transmitter site was unsuitable because it was located on marshland and, even if the proposed transmitter site were on dry land, the proposed transmitter site would not enable Station WBEY to provide a 70 dBu signal to all of Crisfield as required by Section 73.315(a) of the Commission's rules.⁵ As noted above, both Tidewater Communications and Bay Broadcasting filed Petitions for Reconsideration directed to the *Report and Order*.

4. In regard to the Tidewater Communications Petition for Reconsideration, Tidewater Communications and Commonwealth Sinclair filed a Joint Request for Approval of Settlement Agreement. Pursuant to the Settlement Agreement, Tidewater Communications will withdraw its Petition for Reconsideration along with two Informal Objections that it had filed against the respective applications to implement the Station WROX-FM and WPYA(FM) license modifications. In return for these withdrawals, Tidewater Communications will receive \$28,450 and an agreement from Sinclair Communications that it will not utilize a rock music format at its Poquoson, Virginia station for two

⁴ Bay Broadcasting's engineering statement attached to its Petition for Reconsideration of our *Report and Order* states that "ducting" is often referred to as tropospheric ducting and can occur when atmospheric conditions provide, with increasing altitude, an increase in temperature and/or a rapid decrease in water vapor content. The engineering statement asserts that the resulting condition causes radio signals to be bounced, channeled, or "ducted" far beyond the normally predicted distances.

⁵ 47 C.F.R. § 73.315(a)

years.⁶ In accordance with Sections 1.420(j) and 73.3588 of the Commission's rules,⁷ Tidewater Communications has filed a declaration under penalty of perjury listing legitimate and prudent expenses in the amount of \$28,450 that were incurred in connection with its participation in this rulemaking proceeding and in connection with preparing and prosecuting its Informal Objections.⁸ Moreover, Tidewater Communications' pleadings do not raise any matter that amounts to a decisionally significant error in our *Report and Order*. Accordingly, we are approving the referenced Settlement Agreement to the extent indicated herein and dismissing Tidewater's Petition for Reconsideration and its Informal Objections.

5. With respect to Bay Broadcasting's Petition for Reconsideration, as noted above, the *Report and Order* found that the transmitter site was defective because it was located in marshland and, moreover, did not comply with Section 73.315. At the time the *Notice* in this proceeding was adopted, it appeared that Bay Broadcasting's proposed transmitter site was suitable, but the more accurate, current maps from the U.S. Census Bureau which became available prior to the issuance of the *Report and Order* make it clear that the originally proposed site did not meet our technical engineering requirements. Bay Broadcasting continues to claim that its original transmitter site is not defective. In order to remove this controversy and resolve the proceeding, Bay Broadcasting has proposed a new transmitter site and we find that it complies with the Commission's technical rules. We are, therefore, substituting Channel 250A for Channel 245A at Crisfield, Maryland, as originally requested by Bay Broadcasting, but based on the new site. To accommodate this channel substitution, we are allotting Channel 252A to Belle Haven, Virginia, in lieu of Channel 250B1, which was originally allotted in our *Report and Order*. Commonwealth Sinclair has agreed to this alternate channel.

6. We grant the Bay Broadcasting Petition for Reconsideration to the extent that we are substituting Channel 250A for Channel 245A at Crisfield and modifying the Station WBEY license to specify operation on Channel 250A. This channel substitution will obviate ducting interference and permit Station WBEY to operate at full Class A facilities. Channel 250A can be allotted to Crisfield consistent with the engineering requirements of the Commission's rules at coordinates of 37-54-51 NL and 75-42-45 WL, with a site restriction of 14.63 kilometers (9.1 miles) southeast of Crisfield, Maryland. We also conclude that the public interest would be served by substituting Channel 252A for Channel 250B1 at Belle Haven, Virginia. Channel 252A can be allotted to Belle Haven consistent with the engineering requirements of the Commission's rules at coordinates of 37-33-14 NL and 75-49-14 WL, with a site restriction of 0.04 kilometers (0.02 miles) southeast of Belle Haven, Virginia.

7. Accordingly, pursuant to the authority contained in 47 C.F.R. Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b), and 47 U.S.C. Sections 0.61, 0.204(b) and 0.283, IT IS ORDERED, That effective September 13, 2004, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED for the

⁶ The Commission does not regulate entertainment formats. Thus, we have not considered the rock format provision in deciding whether to approve the Settlement Agreement. See *GAF Corporation*, 7 FCC Rcd 3225, 3226 (1992).

⁷ 47 C.F.R. §§ 1.420(j), 73.3588.

⁸ The declaration was signed by David Parelus, Vice President of Tidewater Communications.

communities listed below, as follows:

<u>Community</u>	<u>Channel Number</u>
Crisfield, Maryland	250A
Belle Haven, Virginia	252A

8. A filing window for Channel 252A, Belle Haven, Virginia, will not be opened at this time. Instead, the issue of opening that allotment for auction will be addressed by the Commission in a subsequent order.

9. IT IS FURTHER ORDERED, That the Petition for Rule Making (RM-10405) filed by Bay Broadcasting, Inc. in MM Docket No. 02-76 IS GRANTED to the extent indicated herein.

10. IT IS FURTHER ORDERED, That the Joint Request for Approval of Settlement Agreement IS GRANTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That MM Docket No. 02-76 IS TERMINATED.

12. For further information concerning this proceeding, contact R. Barthen Gorman, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau